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16 *and Wal-Mart Stores, Inc.*

17 UNITED STATES DISTRICT COURT  
18 NORTHERN DISTRICT OF CALIFORNIA

19	IN RE ONLINE DVD RENTAL ANTITRUST LITIGATION	Master File No. M:09-CV-2029 PJH  MDL No. 2029  Hon. Phyllis J. Hamilton
20		
21		
22	This document relates to ALL ACTIONS EXCEPT:  <i>Pierson v. Walmart.com USA LLC et al.</i> , 09-CV- 2163; <i>Levy v. Walmart.com USA LLC et al.</i> , 09- CV-2296; <i>Spears v. Netflix, Inc. et al.</i> , 09-CV- 2064	WALMART.COM USA LLC's AND WAL-MART STORES, INC.'S ANSWER TO CONSOLIDATED AMENDED CLASS ACTION COMPLAINT
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27		

1 NOW COME Defendants Wal-Mart Stores, Inc. (“Wal-Mart Stores”) and Walmart.com  
 2 USA LLC (“Walmart.com”) (referred to collectively as “Defendants”), and answer Plaintiffs’  
 3 Consolidated Amended Class Action Complaint.

#### 4 **NATURE OF THE ACTION**

- 5 1. Paragraph 1 does not contain any allegations that require an answer.
- 6 2. Denied.
- 7 3. Defendants admit that at the beginning of 2005, Netflix and Walmart.com  
 8 competed for subscribers of online DVD rental services. Defendants deny the allegations of  
 9 sentence 2 of paragraph 3. Defendants admit that in early January 2005, Walmart.com lowered  
 10 the price of its two-DVD-at-a-time subscription plan, but deny that this was due to plans to expand  
 11 into the market. Defendants lack knowledge or information sufficient to form a belief about the  
 12 truth of Plaintiffs’ allegation that this price decrease put further price pressure on Netflix.  
 13 Defendants admit that in January 2005, Reed Hastings communicated with John Fleming about  
 14 their respective companies’ businesses.
- 15 4. Denied.
- 16 5. Defendants deny Plaintiffs’ characterization of the May 19, 2005 agreement (the  
 17 “Promotion Agreement”) as a “Market Allocation Agreement,” since the agreement did not  
 18 allocate markets. Defendants otherwise admit the allegations of sentence 1 of paragraph 5.  
 19 Defendants deny the remaining allegations in paragraph 5.

#### 20 **PLAINTIFFS**

- 21 6. Defendants lack knowledge or information sufficient to form a belief about the  
 22 truth of the allegations in the first two sentences of paragraph 6. Defendants deny the remaining  
 23 allegations in paragraph 6.
- 24 7. Defendants lack knowledge or information sufficient to form a belief about the  
 25 truth of the allegations in the first two sentences of paragraph 7. Defendants deny the remaining  
 26 allegations in paragraph 7.



1 agreement did not allocate markets, but admit that Walmart.com competed with Netflix through its  
2 “Wal-Mart DVD Rentals” service.

3 16. Defendants admit that Wal-Mart Stores is the largest brick and mortar seller of new  
4 DVDs. Defendants lack knowledge or information sufficient to form a belief about the truth of the  
5 remaining allegations in paragraph 16, including whether Walmart.com is the largest online seller  
6 of new DVDs.

7 17. As to the first sentence of paragraph 17, Defendants deny that Walmart.com  
8 entered a conspiracy, or that the “Walmart DVD Rentals” service was a “major competitor” of  
9 Netflix for subscribers of online DVD rental services prior to the entry of the Promotion  
10 Agreement. Defendants admit that the online DVD rental service was available at  
11 www.walmart.com. Defendants lack knowledge or information sufficient to form a belief about  
12 the truth of the allegation in sentence 2 of paragraph 17. Defendants admit the allegations in  
13 sentences 3-4 of paragraph 17.

14 18. Defendants admit the allegations in sentence 2 of paragraph 18. Defendants admit  
15 that the statement attributed to John Fleming in sentence 3 was published in a news article.  
16 Defendants lack knowledge or information sufficient to form a belief about whether Fleming was  
17 accurately quoted, and lack knowledge or information sufficient to form a belief about the truth of  
18 the statement. Defendants deny the implications Plaintiffs draw from the quote, and the context  
19 Plaintiffs place it in. Defendants deny the remaining allegations in paragraph 18.

20 19. Denied.

21 20. Denied.

22 21. As to paragraph 21, Defendants admit that, in response to a subpoena to Wal-Mart  
23 Stores, Assistant General Counsel for Wal-Mart Stores, Susan Schell used the phrase quoted in  
24 sentence 1. Defendants deny the implications Plaintiffs draw from the quote, and the context  
25 Plaintiffs place it in. Defendants admit that the joint press release announcing the Promotion  
26 Agreement included information about Wal-Mart Stores in the “About” section, and that the press  
27 release included a statement attributed John Fleming. Defendants lack knowledge or information  
28 sufficient to form a belief about whether Fleming was accurately quoted. Defendants again deny

1 the implications Plaintiffs draw from the quotes, and the context Plaintiffs place them in.  
2 Defendants deny the remaining allegations in paragraph 21.

3 22. Paragraph 22 does not contain allegations to which Defendants need to respond.

4 **JURISDICTION AND VENUE**

5 23. Defendants admit that this Court has subject matter jurisdiction.

6 24. Defendants admit that venue is proper.

7 25. Defendants admit that this Court has personal jurisdiction over Defendants.

8 **INTERSTATE TRADE AND COMMERCE**

9 26. Defendants admit that they participate in interstate commerce.

10 **RELEVANT MARKET**

11 27. As to paragraph 27, Defendants admit that prior to entering the Promotion  
12 Agreement, Walmart.com competed with Netflix for subscribers of online DVD rental services.  
13 Defendants deny the remaining allegations in paragraph 27 and deny the legal conclusion as to the  
14 relevant market in the first sentence of paragraph 27.

15 28. Denied.

16 29. Denied.

17 30. Denied.

18 31. Sentences 1 and 5 of paragraph 31 do not contain any allegations which require a  
19 response. Defendants lack knowledge or information sufficient to form a belief about the truth of  
20 the allegations in sentences 2-4 of paragraph 31.

21 32. Denied.

22 33. Defendants admit that paragraph 33 generally describes the operation of online  
23 DVD rental services. Defendants lack knowledge or information sufficient to form a belief about  
24 the truth of the remaining allegations in paragraph 33.

25 34. Defendants deny sentence 1 of paragraph 34. Defendants admit the allegations in  
26 sentence 2 of paragraph 34. Defendants lack knowledge or information sufficient to form a belief  
27 about the truth of the allegation in sentence 4 of paragraph 34 that late fees constitute 20% of the  
28 revenues in traditional videos stores. Defendants lack knowledge or information sufficient to form

1 a belief about the truth of the allegation that most online video rental subscriptions do not have  
2 late fees or due dates.

3 35. Denied.

4 a. Defendants admit that online DVD rentals are generally priced on a  
5 monthly subscription basis. Defendants deny all remaining allegations in  
6 sub-paragraph (a) of paragraph 35.

7 b. Defendants admit that online DVDs rentals do not require a trip to the store  
8 and are primarily subscription based services. Defendants lack knowledge  
9 or information sufficient to form a belief about the truth of the allegation as  
10 to the current size of the libraries of online rental service providers.  
11 Defendants deny all remaining allegations in sub-paragraph (b) of  
12 paragraph 35.

13 c. Defendants deny the allegations in sentences 1 and 2 of sub-paragraph (c)  
14 of paragraph 35. Defendants lack knowledge or information sufficient to  
15 form a belief about the truth of the remaining allegations in sub-paragraph  
16 (c) of paragraph 35.

17 36. Defendants lack knowledge or information sufficient to form a belief about the  
18 truth of the allegation as to what Reed Hastings believes. Defendants deny all remaining  
19 allegations in paragraph 36.

20 37. Defendants lack knowledge or information sufficient to form a belief about the  
21 truth of the allegations in paragraph 37.

22 38. Defendants admit the allegations in sentences 9 and 10 in paragraph 38.  
23 Defendants deny all remaining allegations in paragraph 38.

24 39. Denied.

### 25 **MARKET AND MONOPOLY POWER**

26 40. Defendants lack knowledge or information sufficient to form a belief about the  
27 truth of the factual allegations in paragraph 40. The legal conclusions do not require a response  
28 from Defendants but are nonetheless denied.



1 whether the statements were accurately quoted. Defendants deny the implications Plaintiffs draw  
2 from the quotes, and the context Plaintiffs place them in. While an admission or denial of the  
3 truth of the quoted statement is unnecessary, Defendants deny the truth of the statements quoted in  
4 sentences 4-5. Defendants deny the remaining allegations in paragraph 49.

5 50. Defendants admit that Walmart.com changed the price of its two-DVD-at-a-time  
6 subscription plan to \$12.97 per month in January of 2005. Defendants admit that the statements  
7 quoted in sentences 4-5 appeared in a publication. Defendants lack knowledge or information  
8 sufficient to form a belief about whether the statements were accurately quoted. While an  
9 admission or denial of the truth of the quoted statements is unnecessary, Defendants deny the truth  
10 of the statements quoted in sentences 4-5. Defendants deny the remaining allegations in paragraph  
11 50.

12 51. Defendants admit that in January 2005, Reed Hastings communicated with John  
13 Fleming about their respective companies' businesses. Defendants deny the remaining allegations  
14 in paragraph 51.

15 52. Defendants lack knowledge or information sufficient to form a belief about the  
16 truth of the allegations regarding Reed Hastings' statements quoted in paragraph 52. Defendants  
17 deny the implications Plaintiffs draw from the quotes, and the context Plaintiffs place them in.  
18 While an admission or denial of the truth of the quoted statements is unnecessary, Defendants  
19 deny the truth of the quoted statements. Defendants deny all remaining allegations in paragraph  
20 52.

21 53. Defendants admit that they issued a press release on May 19, 2005 to announce the  
22 Promotion Agreement. Defendants admit that its joint press release quotes Reed Hastings as  
23 described in paragraph 53. Defendants deny the implications Plaintiffs draw from the quote, and  
24 the context Plaintiffs place it in. Defendants deny the remaining allegations in paragraph 53.

25 54. Defendants admit that articles appeared with the listed titles. Defendants deny the  
26 remaining allegations in paragraph 54.

27 55. Defendants admit that with the exception of the 30-day transition period,  
28 Walmart.com has not offered online DVD rental subscriptions since May 19, 2005. Defendants



1 also admit that Walmart.com offered its current subscribers the option to sign up at Netflix.  
 2 Defendants deny the remaining allegations in paragraph 55.

3 56. Defendants lack knowledge or information sufficient to form a belief about the  
 4 truth of the allegation regarding Reed Hastings's statements quoted in sentences 4 and 7 of  
 5 paragraph 56. Defendants admit that a business publication made the statements quoted in  
 6 sentences 5-6 of paragraph 56. Defendants lack knowledge or information sufficient to form a  
 7 belief about whether the statements were accurately quoted. Defendants deny the implications  
 8 Plaintiffs draw from the quotes, and the context Plaintiffs place them in. While an admission or  
 9 denial of the truth of the quoted statements is unnecessary, Defendants deny the truth of the quoted  
 10 statements. Defendants deny the remaining allegations in paragraph 56.

11 57. Denied.

12 58. Denied.

13 59. Denied.

#### 14 **ANTICOMPETITIVE EFFECTS**

15 60. Defendants admit that an industry publication made the statement quoted in  
 16 sentence 4 of paragraph 60. Defendants lack knowledge or information sufficient to form a belief  
 17 about whether the statement was accurately quoted. Defendants deny the implications Plaintiffs  
 18 draw from the quote, and the context Plaintiffs place it in. While an admission or denial of the  
 19 truth of the quoted statement is unnecessary, Defendants deny the truth of the quoted statement.  
 20 Defendants deny the remaining allegations in paragraph 60.

21 61. Denied.

22 62. Denied.

23 63. Denied.

#### 24 **CLASS ACTION ALLEGATIONS**

25 64. Paragraph 64 does not contain allegations that require a response.

26 65. Denied.

27 66. Denied.

28 67. Denied.

1 a. Denied.

2 b. Denied.

3 c. Denied.

4 d. Denied.

5 e. Denied.

6 f. Denied.

7 g. Denied.

8 h. Denied.

9 i. Denied.

10 68. Denied.

11 69. Defendants lack knowledge or information sufficient to form a belief about the  
12 truth of the allegations in sentence 1 of paragraph 69. Defendants deny the remaining allegations  
13 in paragraph 69.

14 70. Defendants lack knowledge or information sufficient to form a belief about the  
15 truth of the allegations in paragraph 71.

16 71. Denied.

17 **ANTITRUST INJURY AND STANDING**

18 72. Defendants lack knowledge or information sufficient to form a belief about the  
19 truth of the allegations in paragraph 72.

20 73. Denied.

21 **COUNT ONE**

22 74. Defendants incorporate their answers to previous paragraphs by reference.

23 75. Denied.

24 76. Denied.

25 77. Defendants admit that prior to May 19, 2005, Netflix and Walmart.com competed  
26 for subscribers of online DVD rental services. Defendants deny the remaining allegations in  
27 paragraph 77.

28 78. Denied.

1 79. Denied.

2 80. Denied.

3 81. Denied.

4 **COUNT TWO**

5 Count Two is stated against only Netflix. Out of an abundance of caution, Defendants  
6 respond to the allegations as follows:

7 82. Defendants incorporate their answers to previous paragraphs by reference.

8 83. Denied.

9 84. Denied.

10 85. Denied.

11 **COUNT THREE**

12 Count Three is stated against only Netflix. Out of an abundance of caution, Defendants  
13 respond to the allegations as follows:

14 86. Defendants incorporate their answers to previous paragraphs by reference.

15 87. Denied.

16 88. Denied.

17 89. Denied.

18 **COUNT FOUR**

19 90. Defendants incorporate their answers to previous paragraphs by reference.

20 91. Defendants admit that prior to May 19, 2005, Netflix and Walmart.com competed  
21 for subscribers of online DVD rental services. Defendants deny the remaining allegations in  
22 paragraph 91.

23 92. Denied.

24 **PRAYER FOR RELIEF**

25 Defendants deny that Plaintiff is entitled to any relief, including the relief requested.

26  
27 **AFFIRMATIVE DEFENSES**

1 As separate and affirmative defenses, and without admitting any of Plaintiffs' allegations  
 2 or conceding the burden of proof as to any issue found to be an element of the Complaint, rather  
 3 than an element of an affirmative defense, Defendants allege the following separate and  
 4 independent affirmative defenses:

5  
 6 **FIRST AFFIRMATIVE DEFENSE**

7 **(Failure to State a Cause of Action)**

8 The Complaint fails to state a claim upon which relief can be granted.

9  
 10 **SECOND AFFIRMATIVE DEFENSE**

11 **(Waiver, Laches, Estoppel, Statute of Limitations)**

12 Plaintiffs' causes of action are barred by waiver, laches, estoppel, and/or the applicable  
 13 statute of limitations.

14  
 15 **THIRD AFFIRMATIVE DEFENSE**

16 **(Legitimate Business Purposes)**

17 Defendants have at all times and in all relevant manners acted reasonably, as necessary to  
 18 serve legitimate business purposes, in furtherance of trade, in good faith, and with the purpose and  
 19 effect of promoting, encouraging, or increasing competition. Defendants have not acted with the  
 20 purpose or intent to suppress or restrain competition. Defendants had legitimate business  
 21 justifications for all of the conduct at issue.

22  
 23 **FOURTH AFFIRMATIVE DEFENSE**

24 **(Injury Caused by the Conduct of Others)**

25 Any injury to Plaintiffs is the result of causes that are independent of Defendants' conduct.

26  
 27 **FIFTH AFFIRMATIVE DEFENSE**

28 **(Failure to Comply with Netflix Subscription Agreement)**

1 Plaintiffs' claims are barred in whole or in part by Plaintiffs' failure to perform and/or  
2 comply with the terms and conditions of the subscription agreement with Netflix.

3  
4 **SIXTH AFFIRMATIVE DEFENSE**

5 **(Privileged Conduct)**

6 Defendants' conduct at issue was privileged.

7  
8 **SEVENTH AFFIRMATIVE DEFENSE**

9 **(Standing)**

10 Plaintiffs do not have standing to assert the claims in the Consolidated Amended  
11 Complaint.

12  
13 **EIGHTH AFFIRMATIVE DEFENSE**

14 **(No Antitrust Injury)**

15 Plaintiffs do not have the requisite antitrust injury to bring the claims in the Consolidated  
16 Amended Complaint.

17  
18 **NINTH AFFIRMATIVE DEFENSE**

19 **(Damages Speculative)**

20 Based on the Consolidated Amended Complaint, Plaintiffs' damages are speculative and  
21 are therefore barred.

22  
23 **TENTH AFFIRMATIVE DEFENSE**

24 **(Failure to Define the Relevant Market)**

25 Plaintiffs' claims are barred in whole or in part because they fail to sufficiently allege or  
26 otherwise properly define any market for the purpose of asserting their antitrust claims. Plaintiffs  
27 bear the burden of proof on this issue.

**ELEVENTH AFFIRMATIVE DEFENSE**

**(Lack of Market Power)**

Defendants lack market power in the relevant markets. Plaintiffs bear the burden of proof on this issue.

**TWELFTH AFFIRMATIVE DEFENSE**

**(Adequate Remedy at Law)**

Plaintiffs' claims for injunctive or equitable relief are barred because Plaintiffs have an adequate remedy at law.

Dated: July 13, 2009

Respectfully submitted,

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By: /s/ Genevieve Vose

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This is to certify that a true and correct copy of the foregoing instrument has been served on the following counsel of record this 13th day of July, 2009, as indicated below:

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